SUPREME COURT, U. S.
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APPENDIX

In The

Supreme Court of the United States

Term, 1974

No. 74-1222

CHARLES L. WOLFF, JR., Warden of the Nebraska Penal and Correctional Complex,

Petitioner,

vs.

DAVID L. RICE,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI FILED MARCH 27, 1975

PETITION FOR WRIT OF CERTIORARI GRANTED JUNE 30, 1975

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RELEVANT DOCKET ENTRIES

Date	Proceedings
1972	
Sep 29	1. Order (WKU) that Clerk file documents without costs; and Respondent Show Cause —10 days.
	Copy mailed to Petitioner and Attorney General.
	2. Petition for Writ of Habeas Corpus.
	3. Motion to proceed in forma pauperis and affidavit.
	4. Motion for Appointment of Counsel.
Oct 3	5. Order (WKU) appointing David L. Herzog, 1431 One First National Center, Omaha, Nebraska, as attorney to represent Petitioner.
	Copy mailed to counsel and petitioner.
Oct 10	6. Return.
Oct 26	7. Order (WKU)—brief of Petitioner by Oct. 30 and of Respondent by Nov. 13, 1972. Copy mailed to counsel of record and Petitioner.
Oct 31	8. Order (WKU) Fixing Brief Schedule. Copy mailed to counsel of record and Petitioner.
1973	
Apr 26	9. Courtroom Minutes—Trial before Judge Urbom—Submitted.
1974	
Mar 30	10. Memorandum (WKU) setting evidentiary hearing on limited issues in Order to be filed by the Court.

Date 1974		Proceedings
		Copy mailed to counsel of record and petitioner.
Apr 2	11.	Petitioner's Motion to Produce.
Apr 11	12.	Respondent's Return to Motion to Produce.
Jun 5		Entered 2 pleadings filed 6-4-74:
	13.	Petitioner's Motion.
	14.	Order (WKU) directing Clerk issue subpoenas for service without costs. Issued. Copy mailed to Petitioner and counsel of record.
Jun 11	15.	Courtroom Minutes—before Judge Urbom—Trial—Case submitted.
	16.	List of witnesses.
Jul 5	17.	Memorandum (WKU).
	18.	Order (WKU) that petition is granted and petitioner released unless within 90 days of the date of order, or, if an appeal taken, 90 days after decision of the United States Court of Appeals for the Eighth Circuit, whichever is later, the State of Nebraska retries the petitioner. Copy mailed to counsel of Record and Petitioner.
	19.	List of Exhibits.
Aug 5	20.	Respondent's Notice of Appeal. Copy mailed to Petitioner, David L. Herzog, J. Patrick Green and Joseph Pasquale, Court Reporter.
Aug 6	21.	Petitioner's application for Bail with request for Oral Argument.
Aug 6		Certified copy of notice of apppeal and two certified copies of all docket entries mailed

Date 1974		Proceedings
		to Clerk, U. S. Court of Appeals. Certified copies of docket entries mailed to Atty. General.
Aug 15	22.	Respondent's Order for Transcript. Certified copy delivered to Court Reporter.
Aug 16	23.	Courtroom Minutes—before Judge Urbom—Petitioner's application for bail (Filing No. 21)—Denied.
	24.	List of witnesses.
	25.	Order (WKU) denying application of petitioner for bail. Copy mailed to counsel and petitioner.
Aug 26	26.	Reporter's Transcript of trial 6-11-74.
Nov 15	27.	Appellant's Designation of the Record.
1975		
Feb 24	28.	Appearance and Application of William L. Kutmus, 210 Fleming, Des Moines, Iowa to be admitted to practice for bail hearing.
	29.	Application for Rehearing application for bail.
Mar 7	30.	Entered Order (WKU) filed 3-6-75 that application for rehearing on application for bail (@ 29) is stricken; and request by Mr. Kutmus for admission to bar of this court is denied (No. 28). Copy mailed to Petitioner, counsel of record and Mr. Kutmus.
Apr 16	31.	Petitioner's Application for Reconsideration of Motion for Bail. Request hearing.
May 5	32.	Certificate as to copy of portions of record forwarded to Supreme Court of U. S. as per request of Respondent counsel.

Date 1975		Proceedings
May	8	33. Memorandum and Order (WKU) denying application for reconsideration of motion for bail (No. 31).
		Copy mailed to Petitioner and counsel of record.

PETITION FOR WRIT OF HABEAS CORPUS

(Filed September 29, 1972)

TO: The Honorable, The United States District Court for the District of Nebraska.

The Petition of DAVID L. RICE respectfully shows as follows, to wit:

I.

Petitioner is a citizen of the United States of America and of the State of Nebraska.

II.

Petitioner is at present detained, incarcerated and imprisoned at the Nebraska Penal and Correctional Complex at Lincoln, Lancaster County, Nebraska, within the District of Nebraska, by Respondent, CHARLES L. WOLFF, JR., Warden, by virtue of a verdict of guilty and judgment and sentenced to a term of life imprisonment, pronounced by the District Court of Douglas County, Nebraska, per Honorable Donald J. Hamilton, District Judge, on April 17, 1971. After trial by jury, Defendant was found guilty of the crime of first-degree murder. The killing involved the death of Larry D. Minard, Sr., a member of the Omaha Police Division, City of Omaha, on August 17, 1970. Minard was killed while making a police call, when a bomb on the premises where he was making an investigation exploded. The conviction of Petitioner was affirmed by the Supreme Court of Nebraska on July 14, 1972. See 188 Neb. 728, — N. W. 2d — (1972).

III.

Petitioner is restrained, incarcerated and imprisoned pursuant to a sentence that is illegal and void in that the conviction rests upon evidence obtained through illegal searches and seizures in violation of the Fourth and Fourteenth Amendments to the Constitution of the United States of America. The prosecution introduced into evidence against Petitioner exhibits and testimony which were the produce of such illegal searches and seizures, all as more particularly detailed herein.

(a) On the evening of August 2, 1970, officers of the Omaha Police Division searched the home of Petitioner at 2816 Parker Street, in Omaha, Douglas County, Nebraska. Such search pursuant to a search warrant issued by one of the Judges of the Municipal Court of the City of Omaha, Douglas County, Nebraska. However, the affidavit filed with the application for the issuance of said search warrant failed to show probable cause for the issuance of such warrant, as is required by the Fourth and Fourteenth Amendments to the Constitution of the United States of America. During the course of such search, sundry items were discovered which were later introduced as exhibits at Petitioner's trial. Among the items found were a box of ammonia-type dynamite. Such dynamite was introduced as an exhibit, and Kenneth B. Snow, a chemist from the National Laboratory of the Alcohol, Tobacco and Firearms Division of the Internal Revenue Service, testified that such dynamite was of the type used in the bomb which killed Larry D. Minard, Sr. Also found and introduced as an exhibit was a pair of pliers, which Roland L. Wilder, also an employee of the National Laboratory of the Alcohol, Tobacco and Firearms Division, testified had a cutting edge similar to the cutting edge of a tool which had been used to cut wire used in the bomb.

(b) On August 27, 1970, Petitioner was arrested and taken to the Douglas County jail where his clothing was taken from him. Subsequently, RICE's clothing was taken to the laboratory of the Alcohol, Tobacco and Firearms Division of the Internal Revenue Service, where it was analyzed. The analysis showed traces of ammonia dynamite within such clothing. The clothing was introduced as an exhibit at trial. Also introduced was the testimony of Kenneth B. Snow of the Alcohol, Tobacco and Firearms Division Laboratory as to the results of his tests showing the presence of dynamite. The arrest of Petitioner was based solely upon information obtained as a result of the search of his house at 2816 Parker Street. The clothing and the results of the chemical tests thereon were fruits of the unlawful search of 2816 Parker Street, Omaha, Douglas County, Nebraska, and were inadmissible for that reason. In addition, the seizure of the clothing and the physical testing of the clothing were performed without a warrant, when such warrant is required by the Fourth and Fourteenth Amendments to the Constitution of the United States of America. Initially, RICE's clothing was taken for safekeeping. It was only later, while he was in police custody, that a determination was made to have it tested. When the decision to have it tested was made, no emergency existed and ample time was available within which to apply to a Magistrate for a warrant. However, no such application was made. The seizure of the clothing was not incident to RICE's arrest, since it took place after his arrest and after the clothing had been taken for safekeeping by the police. In addition, no evidence existed which would have led the police to believe that there was probable cause to believe that the clothing contained any evidence relevant to the occurrence of any crime. Thus, even if the police could have seized the clothing without a warrant, there was no justification for the seizure.

IV.

Petitioner has exhausted State remedies, as required by 28 U. S. Code, § 2254. All the questions raised herein

were raised upon direct appeal to the Supreme Court of Nebraska from Petitioner's conviction. Such issues are not cognizable in a proceeding under the Nebraska Post Conviction Relief Act, § 29-301, et seq., Nebraska Reissue Revised Statutes, since the questions have been considered by the Supreme Court of the State of Nebraska.

WHEREFORE, Petitioner prays:

(a) That a Writ of Habeas Corpus be directed to Respondent, issued in his behalf;

(b) That Respondent be required to appear in answer to the allegations of this Petition;

(c) That this Court order a production by Respondent of the transcript and Bill of Exceptions with regard to Petitioner's trial in the District Court of Douglas County, Nebraska, and determine the case upon those papers;

(d) That this Court relieve Petitioner of the unconstitutional detention and imprisonment; and

(e) That the Court grant such other and further and different relief as the Court may deem just and proper in the premises.

/s/ David L. Rice

Nebraska Penal and Correctional Complex, Lincoln, Nebraska

RETURN TO ORDER TO SHOW CAUSE

(Filed October 10, 1972)

Comes now the respondent and for return to the order to show cause filed herein, respectfully shows the court:

1. Denies that the search warrant mentioned in paragraph III (a) was issue without probable cause and further alleges that said search was in all respects within the constitutional requirements.

2. Respondent further shows the court that no constitutional rights of petitioner were violated in any other

respects mentioned in said petition and respectfully moves the court to examine the evidence in the state court records and, without further evidentiary hearing, determine the matters herein.

Respectfully submitted,

CHARLES L. WOLFF, JR., Warden of the Nebraska Penal and Correctional Complex, Respondent,

By CLARENCE A. H. MEYER
Attorney General

By /s/ Mel Kammerlohr
Assistant Attorney General
Attorneys for Respondent.

NOTATION AS TO LOCATION OF THE DECISION AND ORDERS IN QUESTION

The opinion of the United States Court of Appeals is set forth in the printed Petition for Certiorari at Appendix I, pages 28-57.

The first memorandum opinion of the United States District Court for the District of Nebraska filed March 30, 1974, that the affidavit supporting the request for search warrant was insufficient and that there had been sufficient exhaustion of state remedies on the issues of searches without a valid search warrant is contained in the Petition for Certiorari, Appendix II, pages 58-72.

The memorandum opinion of the United States District Court filed July 5, 1974, that considering the searches as searches without a search warrant, they were not justified on other alleged grounds, is set forth in the Petition for Certiorari, pages 73-96.

The order of the United States District Court granting the Writ of Habeas Corpus is contained in the Petition for Certiorari at page 97.

The order of the United States Court of Appeals for the Eighth Circuit denying rehearing is set forth in the Petition for Certiorari at Appendix III, pages 98-99.

PLAINTIFF'S EXHIBIT J

In the Municipal Court of Omaha, Douglas County, Nebraska

State of Nebraska, County of Douglas, ss.

AFFIDAVIT AND APPLICATION FOR ISSUANCE OF A SEARCH WARRANT

The complaint and affidavit of Sgt. R. Pfeffer and Sgt. Jack Swanson, on this 22 day of August, 1970, who, being first duly sworn, upon oath says:

That he has just and reasonable grounds to believe, and does believe that there is concealed or kept as hereinafter described, the following property, to-wit: Dynamite and devices which could be used to construct devices which could cause injury to persons and damage to property. Also illegal weapons which he stated should be used against Police Officers.

That said property is concealed or kept in, on, or about the following described place or person, to-wit: A one story white frame house on Parker Street at 2816, In Omaha, Douglas County, Nebraska.

That said property is under the control or custody of David Lewis RICE, Minister of Information, National Committee to Combat Fascism.

That the following are the grounds for issuance of a search warrant for said property and the reasons for his belief, to-wit: David Rice is a known member of the National Committee to Combat Fascism, which advocates the violent killing of Police Officers. A violent killing of a Police Officer occurred, in Omaha, and arrests were made from the membership of the NCCF. We have been told in the past that RICE keeps explosives, at his residence, and also illegal weapons, which he has said should be used against Police Officers.

A warrant authorizing a night-time search is requested because Nighttime when information was secured, and the property may be removed.

WHEREFORE, he prays that a search warrant may issue according to law.

/s/ Sgt. R. Pfeffer

/s/ Sgt. Jack Swanson

SUBSCRIBED AND SWORN to before me this 22 day of August, 1970.

/s/ Simon A. Simon, *Judge of the Municipal Court, Omaha, Nebr.*

(Back side of Application for Search Warrant)

No. 70, Doc. 67, page —, District Court, Douglas County Filed in District Court of Douglas County, Nebraska September 2, 1970, Marvin S. Riefschneider, Clerk.

AFFIDAVIT and APPLICATION
SEARCH WARRANT
FOR

.....

(Address or person)

Filed this 27 day of August, 1970, Municipal Court, Helen Dinan, Clerk, Criminal Division.

PLAINTIFF'S EXHIBIT K

In The Municipal Court of Omaha, Douglas County, Nebraska

State of Nebraska, County of Douglas, ss.

SEARCH WARRANT

TO: Sgts. R. Pfeffer and Jack Swanson

WHEREAS, Sgt. R. Pfeffer and Sgt. Jack Swanson have made affidavit sworn to before me the undersigned _____, Judge of the Omaha Douglas Municipal, State of Nebraska, and

WHEREAS, I am satisfied that there is probable cause to believe that the following grounds exist for issuance of a search warrant, to-wit: David Rice is a known member of the National Committee to Combat Fascism, which advocates the violent killing of Police Officers. A violent killing of a Police Officer occurred, in Omaha, and arrests were made, from the membership of the NCCF. We have been told in the past that David RICE was known to keep explosives at his residence, and also firearms, which he has said should be used against Police Officers.

You are, therefore, commanded, with the necessary and proper assistance, to search the following described place or person, to-wit: Single story frame house, white in color, on Parker Street at 2816, Omaha, Douglas County, Nebraska, for the purpose of discovering and seizing the following described property, to-wit: Dynamite, and Illegal weapons which would be contraband. Also the devices which might be used to construct weapons, or explosive devices which could be used to cause injury to persons, or damage to property, and, if found to seize and deal with the same as provided by law, and to make return of this warrant to me within ten days after the date hereof. This warrant shall be served at any time.

GIVEN under my hand this 22 day of August, 1970.

/s/ Simon A. Simon, *Judge of the Municipal Court, Omaha, Nebr.*

(Back Side of SEARCH WARRANT)

RETURN AND INVENTORY

State of Nebraska, County of Douglas, ss.

Sgt. Jack Swanson, being first duly sworn, deposes and says that on 22 August, 1970, I served the within warrant

and made a diligent search for the property described therein at the place, or person, mentioned therein, and seized and am in possession of the following described property, to-wit: 14 Sticks Dupont Red Cross Extra Strength Dynamite, 40 and 50%. 3 DuPont Elect. Blasting Caps., MS 25, 1 DuPont Elec. Blasting Cap. 3pcs assorted wire. 1 Marathon No. 499 RR 6 Volt Battery. 1 pr Homecraft wire dykes. 1 CeeTee Co. Pliers. 1 long nose dyke, made in Japan, orange grips. 2 3/8 XIX 3/4 inch permanent magnets. 1 Mosberg model 351 KC 22 Long Rifle, semi-automatic rifle. Ser. No. 54791. 1 Savage Arms Springfield Model 840 30-30 cal. bolt action rifle, ser No. 269438. 1 Mosberg Model 183D-B 3" shot gun. 1 Astra Model 600/43 9 Mm SemiAutomatic pistol ser No. 24143. 1 .225 or 30-30 cal magazine, cap. 4 rounds. 1 magazine capacity or caliber unknown.

Said property was inventoried in the presence of Sgt. Robert Pfeffer, Ptlm. Glenn Steimer, and a copy of said Warrant and a receipt for said property was (left at) 2816 Parker Street.

DATED this 22 day of August, 1970.

/s/ Jack D. Swanson
Sergeant Omaha Police Dept.

SUBSCRIBED AND SWORN TO before me this 27 day of August, 1970.

/s/ Simon A. Simon, *Judge*

Warrant and inventory return on this 27 day of Aug. 1970.

/s/ Simon A. Simon, *Judge of the Municipal Court, Omaha, Nebr.*

No. 70, Doc. 67, Page ....., District Court, Douglas County. Rice, David Lewis.

Filed in the District Court, Douglas County, Nebraska, September 2, 1970, Marvin S. Reifschneider, Clerk.

SEARCH WARRANT
FOR

.....

(Address or person)

Filed this 27 day of Aug., 1970, Helen Dinan, Clerk, Criminal Division.

TRANSCRIPT OF TESTIMONY

(Filed August 26, 1974)

(Page 3) The Court: This is a hearing pursuant to my order of March 29, 1974, to assist in the resolution of the question of whether the search of the Rice premises was proper and more particularly whether it may be justified on the ground that there was an arrest warrant for David Peak in existence, and further whether the items found in that search, or some of them, were within the Plain View Doctrine.

It appears to me that in view of my conclusion that the search warrant itself was invalid that the obligation devolves upon the government, the State to produce evidence touching the propriety of the search aside from the warrant. So I will permit you to move forward, Mr. Kammerlohr.

(Page 4) JACK DALE SWANSON

being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Kammerlohr

Q. State your name please.

A. Jack Dale Swanson.

Q. Where are you now employed, Lieutenant Swanson?

A. I am a member of the Omaha Police Division in Omaha, Nebraska.

Q. How long have you been a member of the Omaha Police Department?

A. Fourteen years.

Q. And you were so acting on August 22, 1970?

A. Yes, sir.

Q. And all through that summer and year prior to that then, weren't you?

A. Yes.

Q. Now at the original trial of David Rice you testified that on that date, I believe, August 22, 1970, that you in company with what was referred as the task force, went out to the headquarters of the NCCF—do you recall that?

A. Yes.

Q. And that the reason that you went there was to execute an arrest warrant for Duane Peak and defendant Poindexter?

(Page 5) A. Yes.

Q. After you were unsuccessful in finding them there you testified you went somewhere else, I believe it was Peak's home, was it, or do you recall?

A. It was—I can't recall the exact address but it was the residence of William and Frank Peak.

Q. And you also testified that you were unsuccessful in finding either Duane Peak or defendant Poindexter at that address so that then you went to 2816 Parker Street which is the home of David Rice, the petitioner?

A. Yes.

Q. And you testified on direct questioning: What was your purpose in going to that address? Answer: We were looking for Duane Peak.

A. Yes.

Q. Do you recall that testimony?

A. Yes.

Q. Now will you just tell the Court in your own words why you would go to 2816 Parker Street to look for Duane Peak?

Mr. Herzog: Objection, without proper and sufficient foundation, self-serving, calls for a conclusion or opinion of the witness.

The Court: Objection overruled. He may answer.

(Page 6) A. For two years previous to this particular homicide I was a sergeant assigned to the Omaha Police Division, Intelligence Unit, and part of our responsibilities at that time were to maintain and keep records of militant or extremist groups who advocated violence against police officers or other city officials in the community. Our investigation showed that David Rice was a member of the Black Panther Party or the National Committee to Combat Fascism; and that his residence was 2816 Parker Street; and that this 2816 Parker Street was not only the residence of David Rice but was used periodically as a meeting place for other—for all members of that particular organization.

Mr. Herzog: I move, your Honor, that the testimony be stricken for the reason that it is not responsive to the question, it is self-serving, without proper and sufficient foundation, is hearsay; and for those reasons move that that testimony thus far be stricken.

The Court: The motion is denied. The answer will stand.

Q. Lieutenant Swanson, for this two-year period, among other things had there been a newspaper circulated around Omaha, Nebraska, purportedly representing either the Black Panther or NCCF organization?

(Page 7) A. Yes.

Q. And had you seen copies of that?

A. Yes.

Q. And there are copies in evidence in this case—

A. Yes.

Q. —as you probably know?

A. Yes.

Q. Did that newspaper list the name of David Rice, an officer in that organization, either the Black Panther or the NCCF?

A. Yes.

Q. And did articles appear with his—purportedly putting his name as the writer of them?

A. Yes.

Q. Now how about Duane Peak? Had you determined that he was also a member of the NCCF?

A. Yes.

Q. And before August 22, 1970?

A. Yes.

Q. And can you just tell us how you came about this information?

A. I can't remember specifically how we listed Duane Peak as a member. I know that in March, 1970, we listed him on the intelligence bulletin which we put out for the other members of the police division, as a (Page 8) member. And we got that type of information either through informants or personal observations at meetings where they wore specific garb of the organization; and also through surveillance on houses.

Q. Did the members wear a particular kind of garb when they had meetings?

A. Normally at meetings, rallies and so forth most of the members would wear buttons of some sort describing,

you know, their particular slogan of the month or something; and a lot of times black berets, or something.

Q. Did you, before you went to the residence of David Rice that date, August 22, 1970, when a subsequent search was had, did you have any information in your police records that Duane Peak had planted the bomb in question for the NCCF?

Mr. Herzog: I object to the form of the question, your honor, as being cumulative, leading and suggestive, lacking proper and sufficient foundation for receipt in evidence.

The Court: Would you read the question, Mr. Reporter?

Reporter: "Did you, before you went to the residence of David Rice that date, August 22, 1970, when a subsequent search was had, did you have any information in your police records that Duane Peak (Page 9) had planted the bomb in question for the NCCF?"

The Court: He may answer it yes or no or "I don't know"—one of the three.

A. Yes.

Q. What information did the police records show?

Mr. Herzog: Objected to as not the best evidence, hearsay, conclusions and opinions, your Honor.

The Court: Sustained.

Q. What information did you have in regard—you personally have in regard to that Duane Peak purportedly planted the bomb for the NCCF?

Mr. Herzog: Same objection, your Honor.

The Court: Overruled. He may answer.

A. I had knowledge that the County Attorney's office had issued an arrest warrant for Duane Peak for murder.

Q. Did you have knowledge that the police report reflected or that in the evidence in this case, that Donald Peak had told the police that his brother planted the bomb for the NCCF?

Mr. Herzog: Objected to as hearsay; conclusions and opinions; and not the best evidence.

The Court: Overruled. He may answer.

A. Yes.

Mr. Herzog: Your Honor, may I hear the last question (Page 10) and answer please?

Reporter: "Did you have knowledge that the police report reflected or that in the evidence in this case, that Donald Peak had told the police that his brother planted the bomb for the NCCF?" Answer: "Yes."

Q. And that brother was Duane Peak referred to?

A. Yes. Your Honor, could I make a correction on that last answer?

The Court: Yes, you may.

A. I can't recall now whether I had knowledge he allegedly made the phone call to lure the officers up to the house or whether he was the one—I don't recall what the report said, whether it was actually planting the bomb or making the phone call. It was one of the two.

Q. Before this task force left the police station did you have a briefing session of some kind?

A. Yes.

Q. And you were going out to execute the arrest warrants on Duane Peak and defendant Poindexter?

A. Yes.

Q. At this briefing conference was Captain Bruce Hartford present?

A. Yes.

Q. And Lieutenant Pfeffer?

(Page 11) A. Yes.

Q. And yourself?

A. Yes.

Q. And together with probably some other officers?

A. Lieutenant Perry.

Q. Did the members generally go over what information the police had obtained so far concerning where they might look for Poindexter and Duane Peak and why?

A. Yes.

Q. Could you tell the Court about that, what went on at the briefing session?

Mr. Herzog: Object to any testimony regarding the briefing session as there as there has been no foundation laid as to time and place where such a session took place.

The Court: Very well. That ought to be cleared up.

Q. What time of day and on what date was this briefing session?

A. As I recall it should have been around 4 or 4:30 in the afternoon.

Q. And this would be the same time and date that you went out to the NCCF headquarters?

A. Yes.

Q. And eventually over to David Rice's house, is that right?

(Page 12) A. Yes.

Q. Was the information that was passed among you at this briefing session information that had come officially to the police department in its investigation of the bombing of Officer Minard?

Mr. Herzog: Objection, your Honor. It calls for a conclusion and opinion as to what those documents are or the source of the information, without proper and sufficient fundation.

The Court: Objection sustained.

Q. Were the police officers at this briefing session exchanging information which had been acquired during the investigation?

A. Yes.

Q. Can you tell us generally what kind of information you received that would indicate where you should look for Duane Peak?

Mr. Herzog: Objection, your Honor. Hearsay, including the other objections.

The Court: Overruled. He may answer.

A. I am sorry. Could I have the question repeated?

The Court: Yes, you may.

Reporter: "Can you tell us generally what kind of information you received that would indicate where you should look for Duane Peak?"

(Page 13) Mr. Herzog: Your Honor, I would further interpose the objection that it is leading and suggestive, and the further objection as to foundation and hearsay.

The Court: Overruled. He may answer.

A. Well those of us that hadn't been involved in certain interviews that were going on at the station at that time were more or less brought up to date about some police interviews which yielded evidence that Duane Peak and Ed Poindexter were involved in a homicide; and then we were informed that warrants for the arrest of Ed Poindexter and Duane Peak had been issued; and it was decided that the first place we were going to look for both of these principals were the headquarters at 3508 North 24th Street.

Q. What headquarters were those?

Mr. Herzog: If the Court please, that was a rather long answer and I didn't get it all. May I have it repeated?

The Court: Yes, you may.

Reporter: "Well those of us that hadn't been involved in certain interviews that were going on at the station at that time were more or less brought up to date about some police interviews which yielded evidence that Duane Peak and Ed (Page 14) Poindexter were involved in a homicide; and then we were informed that warrants for the arrest of Ed Poindexter and Duane Peak had been issued; and it was decided that the first place we were going to look for both of these principals were the headquarters at 3508 North 24th Street."

Mr. Herzog: Thanks very much.

Q. Were those the NCCF headquarters?

A. Yes.

Q. Now you had had those headquarters under surveillance for a couple years, hadn't you?

A. Well this particular headquarters hadn't been the headquarters for that length of time. I would have to say several months.

Q. Several months?

A. Yes.

Q. How about—did they have any other official headquarters of the NCCF before that?

A. Yes; but I couldn't recall the addresses right now about the others.

Q. All right. Do you know personally whether or not Duane Peak had been seen going in and out of these headquarters prior to the actual bombing?

A. Yes.

Q. And had he?

(Page 15) A. Yes.

Q. And would this be a frequent occurrence or a rare occurrence would you say?

A. Well I would just have to say it was normal. There were certain people that were usually coming in and out of the house, and he was one of the people. It would not be unusual to see him there.

Q. And do you know any other members of his family—his immediate family?

A. No. I knew his cousins who frequented the house.

Q. What was his name?

A. Well William and Frank Peak.

Q. They were cousins?

A. Yes.

Q. At this briefing session did Captain Hartford stress the fact that he felt the police were acting in an emergency type situation?

Mr. Herzog: Hearsay, your Honor.

The Court: It may be but I will hear the answer. Overruled.

A. Yes.

Q. What were the facts as to the operation of the Omaha Police Department following the bombing of Officer Minard as to their work details?

Mr. Herzog: May I hear the question again please?

(Page 16) The Court: Yes, you may.

Reporter: "What were the facts as to the operation of the Omaha Police Department following the bombing of Officer Minard as to their work details?"

Mr. Herzog: It is immaterial, your Honor. It is not an issue before the Court. I will further object that the question is nonspecific and there is no proper and sufficient foundation that this officer of his own knowledge knows sufficient information to respond to that question. It is too broad.

The Court: Objection sustained.

Q. Following the bombing of Officer Minard did the Omaha Police Department continue operating on regular shifts?

Mr. Herzog: Same objection, your Honor.

Q. Or were officers required to work overtime, double shifts or anything of that nature?

Mr. Herzog: Same objection.

The Court: Overruled. He may answer.

A. I can't specifically recall anything in the uniform division. I know in our unit, the intelligence unit and in the homicide unit we were working exceptionally long days. In this particular phase of the investigation here most of them worked 36 hours.

Q. And were you the head of the intelligence division (Page 17) at that time?

A. Yes.

Q. Was it your feeling that there was in your judgment as a police officer any need for haste or any urgent or pressing situation that needed to be cleared up in a hurry for fear that danger of the public might be involved?

Mr. Herzog: Conclusion and opinion, your Honor.

The Court: It is, but I will permit him to answer.

A. Yes.

Q. What was your feeling in that matter as an experienced police officer?

Mr. Herzog: Immaterial, irrelevant.

The Court: Overruled. He may answer.

A. Well we knew that there was more dynamite in the community that hadn't been recovered and this was causing us a high amount of concern because—well we thought there may be more bombings.

Q. When you went over to 2816 Parker Street as you testified at the trial, you were looking for Duane Peak. Do you know about what time the night you arrived there?

Mr. Herzog: If your Honor please, the question calls for a conclusion and opinion of the witness; and it misstates the evidence—improper.

(Page 18) The Court: In what way does it misstate the evidence?

Mr. Herzog: For the reason that the officer has testified that he—well perhaps I should withdraw my objection at this time and cover that on cross-examination.

The Court: Very well. Overruled. He may answer.

A. I believe we got to the house around 9:30 P. M.

Q. Did you knock on the door?

A. Yes.

Q. What happened?

A. Yes.

Q. What happened?

A. We received no answer.

Q. And ~~were~~ there lights on or anything going on inside the house?

A. There was a television set playing inside the house.

Q. And then what did you do? Was the door unlocked or did you have to break it down, or how did you get in?

A. At that particular time we decided to, based on other information we received, we decided to apply for a search warrant before we went into the house.

Q. All right. And did you leave some officers around the house and some went to get the search warrant—is (Page 19) that what happened?

A. Yes.

Q. Now the search warrant isn't involved today, so you are back to the point when you did enter the house. How many officers were there at that time?

A. I would say altogether probably 10 or 12.

Q. And were you the one that led them into the house?

A. As I recall I was the first one that went down the basement, but I can't really recall whether it was myself or another officer that actually entered the house first.

Q. When you entered the house how did you proceed?

Mr. Herzog: Your Honor, I am sorry to interrupt. May I interpose an objection, to reserve and preserve my objection to any further inquiry on this line of questioning for the reason the Court has ruled on the search warrant already, and that is the ruling of the court, and that any further testimony would authorize adducing testimony as a result of an illegal search and seizure or seizure effort. The testimony to date indicates that entry was after a search warrant had been obtained, and that is all the thrust of the meaning of the testimony as I gather at this point. I would object to the testimony for the (Page 20) reason that it is the product of an illegal search and seizure and an unreasonable search and seizure.

The Court: It seems to me I am not in a position now to decide whether the entry aside from reliance upon the search warrant is valid; not being in a position to rule on that at this moment because I haven't heard all the

evidence, and I will overrule your objection and hear the rest of this testimony. Do you want the question reread to you, sir?

A. Yes.

Reporter: "When you entered the house how did you proceed?"

A. Well the first thing we wanted to establish is whether or not Duane Peak was in the house and so some officers instituted a search of the upstairs area, and I and others went down in the basement. We started to search the house for Duane Peak.

Q. You were aware, as you have already testified, there was a arrest warrant out for Duane Peak and Edward Poindexter, were you not?

A. Yes.

Q. And despite the fact you had a search warrant were you still attempting to execute those arrest warrants?

(Page 21) A. Well a search of the house for Duane Peak was first because, to avoid any danger, if anybody in the house was armed we wanted to find that first, before we searched for any evidence.

Q. What I am asking is, despite the fact you took the precaution to get a search warrant you were still attempting to execute the arrest warrant when you entered David Rice's house, is that correct?

A. Yes.

Q. Did you know whether or not Edward Poindexter and Duane Peak frequented David Rice's house previous to this time?

Mr. Herzog: Objection. It calls for a conclusion and opinion.

The Court: Overruled. He may answer, if he can.

Q. And had they?

A. Yes.

Q. When you entered this house did you storm in or did you go in very carefully?

A. Very carefully.

Q. And what was the reason for that?

A. Well we were afraid if there were dynamite in the house it may possibly be wired.

Q. You were afraid there might be wires strung around you (Page 22) might stumble over and set off a bomb or something?

A. Yes.

Q. Did you see any tools or anything of that nature when you entered the main part of the house?

A. Yes.

Q. And can you just tell us where those things were —what they were as you best recall and where they were lying?

A. Well as we came in the kitchen door right in the kitchen, I believe it was against the west wall, there was a kitchen counter with cabinets above, and there were— I can't recall the exact location of each item, but there were some tools and wires and things laying around on the counter.

Q. Were the wire and tools that have been introduced in this case the ones you are referring to?

A. Yes.

Q. Were they in plain sight?

A. Well I can't recall the exact location of those specific tools because I didn't collect that evidence, but I recall seeing things on that counter. Specifically I recall seeing wires and stuff laying on there.

Mr. Herzog: Your Honor, I would like to renew the same objection and perhaps if I may have a continuing objection, subject to the Court's (Page 23) previous ruling?

The Court: You may. It is overruled.

Q. And you said you led a group to the basement of that same house?

A. Yes.

Q. This was shortly after you entered the house and looked around upstairs?

A. Yes.

Q. Would you tell us just what happened as you proceeded down the stairs of the basement and what you saw when you got there to the bottom?

A. Well as we went down the basement stairs there was a corner that as soon as you got to the bottom of the stairs you could turn to the right and there was a space that sort of went back into the basement wall sort of; and we were going to look in there for the possibility of anybody hiding or over behind the furnace or just any place where somebody could be hiding down there, and that's when we or I—I can't recall specifically now who saw it first, but when I looked down there was kind of a broken door, kind of leaning at an angle over a box, and I could see the cylinders of what were by then familiar to me, because we had been recovering this same type of dynamite in the past months in Omaha; and I recognized it as this 50 percent (Page 24) or 40 percent Dupont Red Cross dynamite we had been recovering.

Q. And you could see this dynamite in the box without removing anything?

A. Yes. I could see probably about a third of a cylinder.

Q. Were you using electric lights or flashlights or what?

A. Well I had a flashlight.

Q. Now handing you what has been marked as Exhibit A, Lieutenant, can you describe what that depicts?

A. Well this looks like the place where the dynamite was laying down there before we moved it, and the stairway would be back here (indicating). When you came down the stairway you turn to the right, and this would be back there (indicating).

Q. And that area shows what looks like it might be a water heater lying down there?

A. Yes.

Q. And where you saw the box would be to the right of where you saw the water heater then?

A. Yes.

Q. About what dimensions would you say the depth and width of that area were as you recall?

A. I would say probably 6 feet. It would be just a guess.

Q. Six feet deep and 6 feet wide both?

A. Probably not as wide as it were deep.

(Page 25) Q. There is also something purported to be a target. Was there a target or something in the back of that area?

A. Yes, sir; a pistol target with some holes in it.

Mr. Kammerlohr: I will offer Defendant's Exhibit A, your Honor.

Mr. Herzog: I only object to the materiality, your Honor.

The Court: Overruled. Exhibit A is received.

Q. About how large was the—you did remove the box and dynamite from that area, is that correct?

A. Yes; after close examination we did.

Q. You first examined to make sure it was not booby-trapped, is that correct?

A. Yes, sir.

Q. About how large a box was this you are referring to that the dynamite was in?

A. I believe the sticks were 18 inches long and then the box was—oh, it could have been 2 feet or something like that. The dynamite was stacked across.

Q. After you removed the box of dynamite what did you do with it immediately?

A. I carried the dynamite upstairs and I believe I handed it to Officer Glenn Steimer, who placed it (Page 26) in the trunk of our cruiser car.

Mr. Kammerlohr: May I approach the witness, your Honor?

The Court: You may.

Q. Handing you what has been marked Exhibit B, does that box in the trunk of that car appear to be the same box that you removed from the Exhibit A area?

A. Yes.

Mr. Kammerlohr: I will offer Exhibit B, your Honor.

Mr. Herzog: Only as to materiality will be the objection of the petitioner, your Honor.

The Court: Overruled. Exhibit B is received.

Q. You stated that you had seen dynamite similar to this on previous occasions?

A. Yes.

Q. So that when you came down there and flashed your light in this area you immediately knew that this was dynamite?

A. Yes; I recognized—

Q. You recognized—

A. I recognized what particular type this was.

Q. Did you find Duane Peak anywhere around that basement area?

(Page 27) A. No.

Q. Or in the house anywhere?

A. No.

Q. Did you find anybody in the house?

A. No.

Q. Did you look around through the house opening up closet doors and things of that nature?

A. Yes.

Q. Did you find Edward Poindexter in there anywhere?

A. No.

Q. Were you aware at that time that Edward Poindexter had been arrested yet?

A. I don't recall if I did or not.

Mr. Kammerlohr: I believe that is all, your Honor.

JACK DALE SWANSON

CROSS-EXAMINATION

By Mr. Herzog

Q. Lieutenant, on the date of August 23, 1970, you possessed the rank of sergeant, did you not?

A. Yes.

Q. And all your police reports published with reference to this matter would have your signature or your identification as Sergeant Jack Swanson, is that correct?

A. Yes.

(Page 28) Q. Lieutenant, at that time and as Sergeant Jack Swanson do you recall publishing a supplementary report under date of August 23, 1970, at the hour of 0007? Do you have your reports with you?

A. No, I don't.

Q. Do you recognize this copy (indicating) entitled "supplementary report?"

A. Yes. This is a report that I made.

Q. And does that report fairly and accurately reveal the state of your mind on the date on which it was created, 23, August, 1970 at 0007 hours?

Mr. Kammerlohr: Your Honor, may I examine that report before this witness answers the question?

The Court: Yes, you may.

Mr. Herzog: Let the record show I am tendering the document to counsel for respondent.

Q. Once again handing you a document counsel for the respondent has examined, would you read it to yourself and I would like to ask you a question when you have concluded reading it please.

A. Well I am familiar with the report.

Q. Is the name Duane Peak mentioned on that document?

A. No.

Q. Your memory of course is better with regard to the facts and circumstances on August 23, 1970 when this (Page 29) document was published and created rather than today?

A. I am sorry, but I—

Q. Is your recollection of the facts and circumstances surrounding the entry into 2816 Parker Street clearer today than it was on August 23, 1970?

A. No.

Q. In other words, the August 23 record, which document I have been handing you, which you have examined is much more accurate to your way of thinking?

A. In regard to the search warrant—

Q. Yes.

A. —is what that report deals with.

Q. Do you know where the original of this document is?

A. No.

Q. Were you acquainted with the fact that during the trial before the District Court copies of these police reports were voluntarily tendered by the State to defense counsel, inclusive of myself?

A. I will take your word for it.

Q. All right.

Mr. Herzog: Your Honor, may I have this document marked as an exhibit?

The Court: Yes, you may.

—(exhibit marked for identification)—

Mr. Herzog: For the purposes of impeachment (Page 30) Exhibit C is offered in evidence.

Mr. Kammerlohr: I object to this, your Honor, as irrelevant and immaterial at this particular time.

The Court: Overruled. Plaintiff's Exhibit C is received.

Q. Lieutenant, at the time of your first arrival at 2816 Parker Street you indicated in your direct examination you had just left the North 24th Street headquarters of the Panther Party, is that correct?

A. No.

Q. Had you on that date of August 22, 1970 then at the North 24th Street address—had in actuality an arrest been made at that time of one Robert Cecil?

A. Yes.

Q. Did you have a search warrant at that time to go into the Cecil premises?

A. I don't recall. We had an arrest warrant for Duane Peak and Ed Poindexter.

Q. If Officers Nepodal and Schuemann were present and if they were to testify that at 6:15 o'clock P. M. on August 22, 1970 that Edward Poindexter had been arrested, would that have been correct?

A. It probably is. I just simply can't recall when he was arrested.

(Page 31) Q. Did you have an arrest warrant on your person—you yourself when you went to 2816 Parker Street?

A. No.

Q. The briefing session, as I understand it, took place at 4 P. M., is that correct?

A. Around 4 P. M. sometime.

Q. Thereafter did you leave the Omaha Police facility where that briefing session took place?

A. Yes.

Q. And that police facility is located at 505 South 15th Street, Omaha, Nebraska?

A. Yes.

Q. After you left the briefing session at the police facility did you then go to the residence in Omaha, Nebraska where Mr. Cecil was arrested?

A. Yes.

Q. And from that point did you then travel to 2816 Parker Street?

A. No.

Q. Did you then travel back to the police station?

A. Yes.

Q. At any time after you left the place there where Mr. Cecil was arrested did you stop off or pass by 2816 Parker Street on the way to the Omaha police facility?

A. No.

(Page 32) Q. What was your purpose for going to the police facility after the scene where Mr. Cecil was arrested?

A. Well there was an arrest made at the scene and also a large amount of property taken from the house; and all the officers who participated in that particular search went back to the police building to make reports and mark evidence, and so forth.

Q. And you made a seizure, or you participated at the scene of the arrest of Mr. Cecil in the seizure and the cataloging and the preservation of the property which had been taken?

A. I went back to the police building. I can't recall right now what reports I made or—

Q. After going back to the Omaha police facility and after the arrest of Mr. Cecil and subsequent activity where did you then go? What was the next route?

A. Well we received an assignment from Captain Hartford to go to the known places of the NCCF and attempt apprehension of Duane Peak.

Mr. Herzog: May I have Exhibit C, your Honor?

The Court: You may.

Mr. Herzog: Thank you.

Q. It was generally your assignment, was it not, Lieutenant, that during the late evening hours of August 22, 1970 and early morning hours of August 23, 1970, the effort (Page 33) was and you were so instructed to arrest

members of the organizations, namely members of the Black Panther Party and the National Committee to Combat Fascism, also known as the National Front to Combat Fascism? Wasn't that the general order?

A. Well the report that was made at the time in regards to our assignment was made by Sergeant Volcek, which indicated that around 2130 or 2115, somewhere around there, we received an assignment to attempt to locate Duane Peak.

Q. How about the report of Sergeant Pfeffer, who indicated that the North 24th Street headquarters was raided for the purpose of seeking members of the Black Panther Party, the National Committee to Combat Fascism, also known as the National Front to Combat Fascism, in an effort to arrest members of these organizations in connection with the bombing death of Officer Larry Minard on the 17th of August, 1970?

A. Yes; there were two members named in the warrants.

Q. You knew Mr. Cecil was a member of the hierarchy of these organizations?

A. Yes.

Q. You knew Mr. Rice was a member of the hierarchy of these organizations?

A. Yes.

(Page 34) Q. You knew Mr. Poindexter was?

A. Yes.

Q. And there were other individuals who were either ministers or other members of the organizations that you knew about, did you not?

A. Yes.

Q. To be more specific, wasn't it true that at approximately 7:15 P. M. on August 22, 1970 Captain Hartford, Lieutenant Perry, Sergeant Pfeffer, Sergeant Volcek,

Sergeant Miller and yourself, then Sergeant Swanson, Officer Brisby, Officer Arnold Daily and Glen Steimer, together with Officer Dennis Howard, accompanied members of the Alcohol, Tobacco Tax & Firearms unit of the United States Treasury Department, went to 3508 North 24th Street, then known to yourself as the supposed headquarters of the Black Panther Party?

A. We did go there. I thought the raid was earlier. I was wondering if the time you read didn't reflect what time the report was made. I thought we went earlier in the day, around 5 o'clock.

Q. And did the named individuals that I am interrogating about go there in an effort to arrest members of these organizations, namely the Black Panther Party, the National Front to Combat Fascism, also known as the National Committee to Combat Fascism, in connection (Page 35) with the bombing death of Officer Larry Minard on 17 August, 1970?

A. My personal recollection of this particular search was for two specific parties that were named in arrest warrants who were also members of that particular group.

Q. Do you recall when this search commenced at the Rice premises at 2816 Parker Street, and would Exhibit assist you?

A. I believe around 10:30.

Q. That would be 2230 hours?

A. Yes.

Q. Using the 24-hour clock?

A. Yes.

Q. Lieutenant, you indicated that you knew that dynamite was in the community, did you not?

A. Yes.

Q. Did you also have intelligence or information that a burglary had occurred at a hardware store in Des

Moines, Iowa prior to the date of the death of Officer Minard on 17th August, 1970?

A. Yes.

Q. You also had information that the Hells Angels in Omaha, Nebraska had the dynamite or a part of the dynamite, at least the type that was involved in this case?

(Page 36) A. The Hells Angels?

Q. Yes.

A. I don't recall any information about the Hells Angels having it.

Q. Did you keep intelligence, did you cause surveillance as a part of your general police duties as part of the Intelligence Unit, to cover the activities of the Hells Angels?

A. Yes, sir. They are also a part of our responsibility.

Q. Was the SDS also monitored, the activities of the SDS?

A. Yes.

Q. On the University of Nebraska campus—were they also monitored?

A. The campus in Omaha?

Q. Yes.

A. Yes.

Q. Was the John Birch Society also monitored at that time also?

A. I don't recall any investigation on the John Birch Society.

Q. Officer, referring you to the 10:30 hour on 23 August, 1970 with reference to the premises of David Rice at 2816 Parker Street, you indicated that you ultimately arrived at the premises after leaving the Omaha Police Division Headquarters following the arrest of Robert (Page 37) Cecil?

A. Yes.

Q. Is that the correct sequence?

A. Well no; we went from 3508 North 24th to the Omaha Police Station; and then we received an assignment to attempt to locate Duane Peak, and we went out and started checking some addresses.

Q. You arrived ultimately after checking some addresses prior to your arrival at 2816 Parker Street, to 2816 Parker Street, did you not?

A. Yes.

Q. And you were accompanied by other police officers?

A. Yes.

Q. And were those officers Patrolman Steimer at that time, Officer Dennis Howard, Officer Dennis Taylor, Officer Mohatt, Sergeant Pfeffer and you, at that time, Sergeant Swanson, together with Sergeant Volcek?

A. Yes.

Q. 'You also met with Agents of the Alcohol, Tobacco Tax & Firearms Division, Daly, Curd, Sledge and Casper —they were also present?

A. At the time of the search.

Q. That was after your entry into the premises the A. T. & F. people came in?

A. No. The A. T. & F. personnel joined us at the police (Page 38) station while I was applying for a search warrant.

Q. Thank you.

Lieutenant, as I understand it, you knocked at the door or you were present when a knock issued for the door at 2816 Parker Street?

A. Yes.

Q. There was no response, is that correct?

A. No. No response.

Q. And then you noted a television set, is that correct?

A. Yes. I believe Sergeant Volcek said there was a television set playing. I don't know whether he looked in the window and saw it, or heard it; but there was a television set playing.

Q. Did you make any other attempt to enter into the premises?

A. No.

Q. At that time you had arrest warrants on your—you didn't have arrest warrants on your possession yourself, did you?

A. No.

Q. But did anybody in your party have arrest warrants?

A. No. We simply had knowledge of the arrest warrants.

Q. You then observed the television set. Did you have any other premises you were going to go to after 2816 Parker Street?

A. At that time we had a list of houses as possibilities, (Page 39) plus we were getting new addresses from informants so I imagine, although I couldn't tell you any specific addresses right now.

Q. You arrived at Mr. Rice's house, as I understand you walked up to the door, knocked on the door, noted the TV set on. Is that the time that you withdrew from the premises to travel to the Omaha Police facility once again to have a search warrant affidavit prepared?

A. Yes.

Q. How long were you absent from the Rice premises, if you can recall?

A. I would say probably an hour.

Q. Is it not a fact that you were required to travel from 2816 Parker to the police facility, prepare the search warrant affidavit and the search warrant itself, seek and procure a judge or magistrate to make the presentation to and then travel back with that signed search warrant to 2816 Parker Street?

A. Yes.

Q. And that is why you are indicating it took you at least an hour to accomplish all that?

A. That would be my estimate. I would say about an hour.

Q. Who accompanied you in the effort to procure the search warrant?

A. Lieutenant Pfeffer.

(Page 40) Q. At that time Sergeant Pfeffer?

A. Sergeant Pfeffer, at that time; yes.

Q. When you arrived at 2816 Parker Street again with the search warrant you had officers present who had kept the premises under surveillance, is that correct?

A. Yes.

Q. You then, on the strength of the search warrant signed by the Municipal Court, the judge sitting as a magistrate, entered into 2816 Parker Street, did you not?

A. Yes.

Mr. Herzog: Your Honor, I think I have concluded my cross-examination. Thank you.

The Court: Mr. Kammerlohr.

Mr. Kammerlohr: I have no further questions, your Honor.

The Court: I do have a few questions.

BY THE COURT:

Q. About what time was it do you think that you went to the NCCF headquarters where a so-called raid was made? About what time?

A. The way I recall it, your Honor, I thought it was around 5 o'clock in the afternoon.

Q. All right, sir. Do you have any idea about how long you remained there?

A. I think we were there probably around 45 minutes.

(Page 41) Q. Then you returned to the police station, is that correct?

A. Yes, sir.

Q. And about how long were you there, if you know?

A. I think it was sometime around 9 or 9:15 when we left the station.

Q. And then approximately when did you arrive at the premises of Mr. Rice?

A. It was around 9:30.

Q. Did you go any place, as you recall it, between the time you left the police station around 9 or 9:15, and when you arrived at the Rice resident?

A. Yes. The one house we did attempt to look through the residence of the parents of Frank and William Peak. I can't recall the exact address but I believe 35 something North 29th Street. We were denied entrance into the building. And there was also a police officer there, a Sergeant Foxall, who works with the Police Community Relations; and Sergeant Foxall told us that he had checked the house and he guaranteed us that Duane Peak was not in the residence.

Q. All right. Then you arrived at the Rice house about 9:30 right?

A. Yes.

Q. At that time, do I understand correctly, that is when you knocked on the door and made tthe observation that (Page 42) the TV set was on, and then you and Sergeant Pfeffer left to get a search warrant, is that correct?

A. Yes, sir.

Q. Was there discussion between you and Sergeant Pfeffer or between you and anyone else as to the reason for getting a search warrant before you left the Rice premises?

A. Yes, sir.

Q. What was it as you recall it?

A. Well one thing that had been troubling me all day, since the search of the Black Panther headquarters is that there was dynamite some place but we hadn't been finding it, and so it occurred to me at this time, a decision was made right there. I said "Why don't we check this house for Duane Peak and we may find dynamite or something in there; and maybe we ought to see if we have the grounds that we can put together a search warrant." That was about our thinking on that.

Q. All right, sir. Did you have any discussion about the wisdom, other than the conversation you have just related, anything about the wisdom of going on into the Rice house to look for Duane Peak before getting, or without getting a search warrant?

A. Well of course, that was one of the alternatives and the thing we decided on then, that if we covered the (Page 43) house and if Duane Peak were in there he would be apprehended if he tried to leave, but if we didn't find evidence, and we finally did go in, we would have a search warrant.

Q. Did you have any report from anyone that Duane Peak was then inside the Rice house or had been inside the Rice house that day?

A. No, sir. The only thing we had was a speculation because it was a known house of that particular group, and he was a member of that group and it was a place where he possibly might be.

Q. How many times do you know, or did you have information about Duane Peak's being at David Rice's house before you made the entry into that house?

A. I can't actually recall because at that particular time there were four officers assigned to me on the Intelligence Unit which conducted periodic surveillances of the different Black Panther Party houses. Now I would get information like there was a meeting tonight at 3508 North 24th and several people were there and some names or something. And I recall being told on some occasions that Duane Peak was at one particular address on Parker Street or out on North 24th because he was a relatively new member. I cannot actually ever recall myself seeing Duane Peak at 2816 Parker.

(Page 44) Q. Do I take it from what you have said, however, that you had received reports of some kind indicating that at some time or another he had been at that Rice house address?

A. Yes, sir.

Q. At the time you made the search of the Rice house did you have any information from anyone as to where Duane Peak had actually been within the last day or two before your entry into the Rice house?

A. I can't recall.

Q. Now was there anything that you now can recall to tie Duane Peak to that Rice house at the time you made the entry into the house other than your information that Duane Peak was a member of the NCCF, that David Rice was also a member of that NCCF, that Peak

had been known to go to that house for meetings and otherwise? Now anything else?

A. No; that was about the information we had.

Q. Were the other names of houses that you had on your list other houses of persons known or thought to be members of the same organization?

A. Well there were some houses where some members would show up from time to time, but actually the person who owned the house, at least we didn't have them actually listed as a member, but as being more of an associate. (Page 45) As I recall the principal houses at that particular time were the 3508 North 24th and 2816 Parker.

Q. When you returned to the Rice premises after going for the search warrant, which I take it would be about 10:30—?

A. Yes, sir.

Q. —in the evening. Did you then have the arrest warrant for Duane Peak with you or did anyone who was with you have it?

A. No.

Q. With respect to Defendant's Exhibit A, which is the photograph of the area in the basement where you indicate the dynamite was found, where was the door that you have mentioned?

A. Well the box would be right—just about like this (indicating); the box of dynamite. Now there is a door, or actually a part of a door with broken glass and stuff in it—in very poor condition—was laying kind of across the corner of the box at any angle. Sort of like that (indicating). And when you looked down, straight down, you saw the corner of the box about like this (indicating) with the cylinders sticking out into view there.

Q. All right. Will you make a mark please there? Perhaps that red pen would work—of the approximate (Page 46) location of the box?

—(witness marks exhibit)—

A. It would be behind the pipe.

Q. All right. So that even though your mark appears to be across and in front of the pipe, the box itself was behind the pipe?

A. Right.

Q. All right. And the door then was lying somewhat on top of that but not entirely covering the box so that some of the dynamite was protruding from the door, right?

A. Yes, sir.

Q. Now in order to see the area which is shown by Defendant's Exhibit A was it necessary to open any kind of door or other fixture?

A. No, sir. The basement light was on that you can see right at the top of the picture there, and there is no door. The only—as I recall I think there was a door upstairs to go down to the basement. That's the only door that was open.

Q. Now was the stairway to the right of this picture?

A. The stairway would be on your left.

Q. On my left. All right, sir. In other words, anyone looking at this picture, it would be to that person's left?

(Page 47) A. Yes.

Q. Approximately how high was the area which I refer to as a cubbyhole where this dynamite was found?

A. Well just estimating I would say probably 4 feet.

Q. You think from the bottom level which is just below the little box you have drawn as the location of dynamite, from there up to what apepars to be the top of a wall—

A. Yes.

Q. —which is just below a light bulb would be approximately 4 feet?

A. That would be my best guess, Judge.

Q. All right, sir.

A. I am sure it was deeper than it was high.

Q. Now by depth are you talking about the distance from the front where a person would be standing if he were standing near where that pipe is that is in the picture?

A. Yes.

Q. Back to the—

A. Back to the—

Q. —far end?

A. Right.

Q. Is the box in which the dynamite was found in the same condition in Defendant's Exhibit B as it was when you (Page 48) first saw it in the basement?

A. Yes, it is identical.

Q. With no lid on it?

A. No cover.

Q. Was there a battery found by you some place in the house?

A. Yes, sir. Upstairs in the living room there was a 9 volt battery of the same type that was on the bomb. This particular battery was hooked up to some kind of a sideline lighting apparatus as I recall.

Q. Where was it specifically when you found it?

A. It would have been on the east wall of the living room, which is in the front part of the house against the east wall.

Q. Was it covered in any way—hidden?

A. It was behind—I don't know quite how to—I guess you would call it a partition. It was behind the partition lying on the floor, and it was hooked up with some kind of a lighting bulb.

Q. How did you happen to look behind the partition?

A. To see if anybody was back there.

Q. How big an area was it back there?

A. After I looked back there it wasn't very big. I would say it was about, maybe a foot from the wall, and it was long, probably 6 feet I suppose.

(Page 49) Q. And how tall?

A. Maybe 4 feet.

Q. Is it correct that the long-nosed needle pliers and regular pliers and wire cutters were not actually found by you?

A. Yes, sir.

Q. What about the blasting caps? Were they found by you?

A. As I recall Sergeant Pfeffer found the blasting caps.

The Court: All right. Now any further questions, Mr. Herzog?

Mr. Herzog: No, your Honor. Thank you.

The Court: Mr. Kammerlohr.

JACK DALE SWANSON

REDIRECT EXAMINATION

By Mr. Kammerlohr

Q. Lieutenant, when you were sent out on this assignment to make the arrest of Duane Peak and Edward Poindexter, was this done by Captain Bruce Hartford?

A. The assignment came from Captain Hartford but I believe I got the message from Lieutenant Perry who actually was in charge of the investigation at that time.

Q. And do you know where the arrest warrants were at that time?

A. As close as I could—I remember Captain Hartford had the arrest warrants out at 3508 North 24th.

(Page 50) Q. He had them with him at that time?

A. Yes.

Q. That was the headquarters earlier in the day of the NCCF?

A. Yes.

Mr. Kammerlohr: I have no further questions.

JACK DALE SWANSON

RECROSS-EXAMINATION

By Mr. Herzog

Q. Officer Hartford or Lieutenant Hartford was present at the headquarters on North 24th Street with two warrants?

A. Yes.

Q. One for Peak and one for Poindexter, is that correct?

A. Yes.

Q. Was he present at 2816 Parker Street?

A. No.

Q. And you learned about the existence of the warrants not from Lieutenant Hartford but from another police officer?

A. Captain Hartford presided at this briefing, and I know this is where I found out about the arrest warrants.

I can't specifically remember how I found out about the arrest warrants. It might have been from the County Attorney's office.

(Page 51) Mr. Herzog: That is all I have, your Honor.

The Court: Anything further, Mr. Kammerlohr?

Mr. Kammerlohr: No, your Honor.

The Court: You may stand down, sir.

ROBERT M. PFEFFER

being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Kammerlohr

—recess at 2:27 P. M.—

—resumed at 2:37 P. M.—

Q. State your name please.

A. Robert M. Pfeffer.

Q. How do you spell that last name?

A. P-f-e-f-f-e-r.

Q. What is your present position?

A. At the present time I am a lieutenant, Omaha Police Department.

Q. How long have you been with the Omaha Police Department?

A. Eighteen years.

Q. What was your position in August, 1970?

A. I was a sergeant assigned to the Homicide Unit, Omaha Police Division.

Q. Are you the same Sergeant Pfeffer that testified at the trial of David Rice who is a petitioner in this case?

(Page 52) A. Yes.

Q. You heard the testimony of Lieutenant Swanson just immediately preceding your testimony today?

A. Yes.

Q. Were you present at the briefing session that was held on August 22nd, 1970 at the Omaha Police Headquarters?

A. Yes.

Q. Can you recall some of the other people that were present at that briefing session?

A. There was Sergeant Volcek, Sergeant Swanson, Lieutenant Perry, Captain Hartford and I believe Sergeant Miller was also there—and there were several others there.

Q. Can you tell us the reason for the briefing session —what they told you?

Mr. Herzog: I assume this is foundational, but I would still like to interpose an objection.

The Court: Overruled on the ground that it is foundational.

A. Well we were trying to locate Duane Peak, and we had information that other sources were trying to find him too, and we wanted to see if we could get him first before they eliminated him.

Q. Did you have knowledge or were you informed at that time that an arrest warrant had been issued for Duane Peak?

(Page 53) A. Yes.

Q. For the murder of Officer Minard?

A. Yes.

Q. How about—were you also aware that an arrest warrant had been issued for Edward Poindexter for the same murder?

A. Yes.

Q. About what time of the afternoon or morning on that date was this briefing session being held?

A. 1600, in that area—4 or 4:30 in the afternoon.

Q. Prior to this time had you talked to Donald Peak the brother of Duane Peak.

A. Yes, I did.

Q. And what did Donald tell you?

A. That is, his brother told him that he had been implicated—

Mr. Herzog: May I interpose an objection, your Honor?

The Court: You may.

Mr. Herzog: It is hearsay. I don't see this as being foundational, your Honor. It is not the best evidence.

The Court: Overruled. He may answer.

A. His brother had been involved in the bombing.

Q. Did he tell you anything—that his brother Duane was (Page 54) connected with the NCCF in that bombing?

A. He said that he was a member of the organization.

Q. And did he say anything as you recall, that he was acting on behalf of the organization?

A. I don't recall the exact words that he said, but it was my opinion at this time that he was acting on behalf of the organization.

Mr. Herzog: Move that the last part of the response of this witness be stricken, as it is an opinion and conclusion, your Honor.

The Court: Sustained. It is stricken.

Q. Was it impressed upon you at this briefing session that it was pressing and urgent that these arrests of Duane Peak and Edward Poindexter be made as soon as possible?

A. Yes.

Mr. Herzog: Your Honor, assuming this is foundational, I object to it. May I have a continual objection so as not to interrupt counsel for the respondent. Object to it as hearsay.

The Court: Yes, you may. Objection is overruled. He may answer.

A. Yes. At the briefing we were afraid that there might be more bombings and more deaths; and also we were afraid that the organization would get to Peak before (Page 55) us and eliminate him.

Mr. Herzog: Objection, your Honor. Move the answer be stricken as not responsive.

The Court: Denied. The answer will stand.

Q. Now Officer Minard had been murdered several days before this briefing session, is that correct?

A. Yes.

Q. And had you been working more than your usual amount of hours since that bombing?

A. Yes, sir, I did.

Q. Will you just tell us what the situation was?

A. We worked 56 hours straight at that time.

Q. Was this generally true of the officers in the Homicide Division?

A. Yes.

Q. When you went to 2816 Parker Street in Omaha, Douglas County, Nebraska, which you have been referring to as the David Rice home, you knew then that an arrest

warrant had been issued for Duane Peak and Edward Poindexter?

A. Yes.

Q. Did you have some conversation with someone after you arrived there about whether you should go on into the house at that time or whether you should go get a (Page 56) search warrant?

A. Sergeant Swanson and I talked it over. We had some difficulty at Frank Peak's house. And so we—there was some lights on, there was a television on, and we thought it would be better for us as a safeguard to get a search warrant along with the arrest warrant in case we found something else there besides Peak.

Q. Did you take the precaution of leaving an officer surrounding the house to—

A. Yes.

Q. —in case Peak or someone were in there?

A. Yes.

Q. Approximately how many officers did you leave around the house?

A. I don't recall.

Q. Do you know about how long you and Lieutenant, at that time, Sergeant Swanson were absent from the Parker Street house?

A. Well it was at least an hour or more.

Q. And when you returned there I suppose you checked with the officers to see if anything had happened in the meantime?

A. Yes.

Q. Had anything happened?

A. Not that I recall.

(Page 57) Q. Will you then describe what occurred after that? At that point did you enter the house?

A. I followed Sergeant Swanson in the house.

Q. And the other officers followed behind you?

A. Yes. I don't recall who all went in the house.

Q. Were there also some federal agents with you?

A. Yes.

Q. Did you personally find any tools or wire or anything of that nature which were subsequently introduced in evidence in this case?

A. Well I did find—well I was with Sergeant Swanson downstairs and also after the dynamite was removed I did find some dynamite caps and some wires upstairs.

Mr. Kammerlohr: May I approach the bench, your Honor?

The Court: You may.

Q. Handing you what has been marked as Exhibit A can you tell us what that is, if you know?

A. Well this is the cubbyhole or what I thought perhaps was a coal bin in the downstairs, basement of the home at 2816 Parker Street.

Q. And is that a fair representation of that area?

A. Yes.

Q. Do you have any opinion as to the approximate size of that area?

(Page 58) A. You mean the height and width and all that?

Q. Yes.

A. No, I don't know. I couldn't say but it's—you could just about stand up straight, or I could in it.

Q. Was the depth about the same as the height or deeper?

A. I think it was deeper than it was wide.

Q. And there is a marking on that photograph in red. Would you say that is about where the box of dynamite was located?

A. It is approximate I guess; yes.

Q. I believe at the trial you testified something about a door or something being in this area. Can you explain what the situation was as to that?

A. Well there was like—we had a flashlight, or Sergeant Swanson had a flashlight and he said "Here's some dynamite", and I looked over there; and then we cleared the area. I could see the box and he had his light on and you could see a round thing.

Q. You didn't actually mean you had to remove the door or anything to get to the box?

A. No.

Q. What was the situation that you described as a door?

A. It was at a slant like this (indicating). You could just see underneath it. There was a space under there.

Q. You didn't have to move anything in order to see the (Page 59) dynamite, did you?

A. No.

Q. Handing you what has been marked as Exhibit B does that appear to be the same or similar to the box of dynamite that was removed from that cubbyhole?

A. Yes.

Q. That's shown in Exhibit A?

A. Yes.

Q. Is that about the same amount of dynamite, as far as filling up a box is concerned?

A. Yes. Like I say, we didn't stay down there too long because we felt it might be rigged up some way or

another, and so I went upstairs; and someone else came up too. I don't know who. And I could see the box and I could see cylinders in it, but as far as the amount, I couldn't tell at that time.

Q. Where did you find the dynamite caps?

A. Well they were upstairs, and there was some linoleum that was rolled up, a cylinder of linoleum approximately this high (indicating). I believe it was the front room of the house. I just looked at it with my light and there they were, laying inside the cylinder.

Q. You mean they were inside the linoleum?

A. Yes.

Q. Roll?

(Page 60) A. Yes.

Q. Did you recognize them?

A. Yes.

Q. As dynamite caps?

A. Yes.

Q. Just by flashing your light in there?

A. No. There were some wires attached to—

Q. Well I mean you didn't have to open up the roll of linoleum—

Q. —in order to recognize them as being dynamite caps?

A. No.

Q. Did you say that you found any other articles that were introduced in evidence at the trial?

A. Well we all found some guns and some ammunition I guess. And there were other articles that I don't recall.

Q. Did you see the long-nosed pliers that were introduced in evidence?

A. They were on the counter but I never picked them up. I just came through the house at the time, and we were cautious because—

Q. Were they in plain view there on the counter?

A. Yes.

Q. Was this a one story house and basement?

(Page 61) A. Yes.

Q. Or did it have an upstairs in it?

A. Just one story and a basement.

Q. And did you look around in the various places for Duane Peak in there?

A. Yes.

Q. And you didn't find him or anyone else in the house other than the officers that were with you, is that correct?

A. Yes.

Q. After you left the premises was there a search continued then for Duane Peak?

A. Well I came down the station and helped catalog the evidence, and I don't know where all the other officers were. I can't even recall who was all there at the time.

Mr. Kammerlohr: I believe that is all.

ROBERT M. PFEFFER

CROSS-EXAMINATION

By Mr. Herzog

Q. Lieutenant, you indicated there was a briefing at about 4 o'clock in the afternoon or 1600 hours on 2400 clock?

A. About that time, yes.

Q. And at that time conversation was engaged in as to the (Page 62) desirability of apprehending Duane Peak, is that right?

A. Yes.

Q. At that time you were told that Duane Peak was at the premises of David Rice, 2816 Parker Street?

A. I was told that he was there? No, I wasn't told that he was there.

Q. You then left the police facility after the briefing and went to the location where Robert Cecil was arrested?

A. Yes, sir.

Q. And participated in that action?

A. North 24th Street; yes, sir. I was there.

Q. And from that location you then returned to the Omaha police facility with then Sergeant, now Lieutenant Swanson?

A. Well when I—after the—we went to North 24th Street I came back to the station with Cecil, and I didn't stay and conduct the search of the residence.

Q. What other activities did you engage in before going to 2816 Parker Street? Where did you go to?

A. Well I don't recall the exact address. We went to several houses. I do recall going to Frank Peak's house.

Q. Will Peak?

A. Will and Frank, I believe—I'm not sure.

(Page 63) Q. Looking for Raleigh's house?

A. Was I looking for him?

Q. Yes. Was that one of the names that—

A. No. I never went to his house or I never was looking for him.

Q. Do you know him to be a member of the NCCF?

A. Well I probably heard that he was.

Q. Were you connected with the intelligence squad at the time you accompanied—

A. No.

Q. —the then Sergeant, now Lieutenant Swanson?

A. No.

Mr. Herzog: Your Honor, I am advised that Lieutenant Swanson remains because he is one of the participants in the caravan that came down here, and even though I agreed that he could be released, I wonder if we could have him back in the courtroom, in the event that I would want to call him at a later time?

The Court: You may if he is still here.

Mr. Herzog: Thank you very much.

Q. After the initial contact with the 2816 Parker residence you indicated you were looking for Duane Peak, is that right, at that time?

A. Yes.

(Page 64) Q. You indicated you had a warrant for Duane Peak and Ed Poindexter and the truth is that nobody had a warrant for Peak or Poindexter except either Lieutenant Perry or another command officer. You didn't have a warrant?

A. We never had a warrant on our person but we knew there was a warrant issued.

Q. As I understand it you went up to the house, you observed lights on and a TV set going, and this was when you first arrived at 2816 Parker Street, is that correct? In your experience as a police officer, is this an indication of human activity?

A. Well with the TV on and the lights on we thought someone was possibly in the house; yes.

Q. You were at that time knowledgeable about the existence of the warrant, is that correct?

A. Yes.

Q. You left officers protecting the property until you secured the warrant from Judge Simon A. Simon, magistrate, in this matter and you returned then with then Sergeant Swanson and entered the house, is that correct?

A. Yes.

Mr. Herzog: Your Honor, may I have these three documents marked as exhibits?

(Page 65) The Court: Yes, you may.

Mr. Herzog: Your Honor, Exhibit D has been divided into respectively D-1, D-2 and D-3 and I am handing that exhibit to counsel for the respondent prior to an offer.
—(exhibit handed to counsel)—

Mr. Herzog: Your Honor, I am going to lay a little foundation first before I offer it.

The Court: You may.

Q. Lieutenant, would you take a look at these documents and I will ask you whether or not you recall having observed those documents on a prior occasion? And I am referring to D-1, 2 and 3.

A. Yes.

Q. Did you publish and are you the author of those documents?

A. Well my name is on it and I imagine I did, but I never typed it up.

Q. Do you recall dictating those words and phrases?

A. Yes.

A. And is that a fair transcription of your report on August 23, 1970 at approximately 0110 hours?

A. Yes.

Q. Now the red marks on Exhibit D-1, 2 and 3 are not yours, are they, Lieutenant?

(Page 66) A. Would you repeat that?

Q. The red marks (indicating)?

A. Oh, no, they are not.

Q. They do not belong to you?

A. No.

Q. During the regular course of your business as an Omaha police officer you are required to file reports as close to the occurrence of an event as possible?

A. Yes.

Q. And this is to create a most accurate record of what occurred, isn't it?

A. Yes.

Q. Now I will ask you whether or not Exhibits D-1-2-3 at any place contain any reference to Duane Christopher Peak?

A. Well the first paragraph.

Q. Other than the first paragraph does the document in its entirety refer to Duane Christopher Peak?

A. No.

Mr. Herzog: Your Honor, Exhibit D-1-2-3 are offered. I suspect the offer is infected with some irrelevant matter as to an Ethan Woods and a Michael Irwin Rice, but I offer it because it is the entire document relevant to the matter. The thrust of my offer has to do with the two-thirds (Page 67) of Exhibit D-1 only, for impeachment purposes.

Mr. Kammerlohr: We only object to the emphasis marks which have been added on by someone, your Honor.

Mr. Herzog: Those have been added by myself, your Honor, and I will stipulate that they should go out.

The Court: Yes. They will be disregarded. I have a copy of that report before me without those marks on it. Is there any reason why it shouldn't be marked and used rather than the one with the marks?

Mr. Herzog: That's fine, your Honor. We will substitute that one then.

Your, Honor, the substitution has been effected and counsel for the respondent has viewed the substitution.

The Court: Very well. Exhibits D-1-2-3 are received.

Mr. Herzog: Your Honor, may I withdraw the original D-1-2-3?

The Court: Yes, you may.

Mr. Herzog: And remove them from the courtroom?

The Court: Yes.

(Page 68) Q. Lieutenant, in your conversation with Donald Peak, relative to the testimony developed by Mr. Kammerlohr, Donald Peak never mentioned the name of David Rice, did he?

A. I don't recall. I don't have the transcript—if he said it at the time that I talked to him or not.

Mr. Herzog: Thank you very much. That is all the questions I have.

The Court: Anything further, Mr. Kammerlohr?

ROBERT M. PFEFFER

REDIRECT EXAMINATION

By Mr. Kammerlohr

Q. When you left the Rice house to go get the search warrant did you have any more information then to get a search warrant than you would have had say at 5 o'clock that same day?

Mr. Herzog: It calls for a conclusion and opinion, your Honor. It really is not probative or in response to anything elicited on cross-examination.

The Court: Overruled. He may answer.

A. Well we had the information from Donald Peak that his brother was involved and also that information from the intelligence squad that he had been seen with (Page 69) Rice and also had been in the area.

Q. You had that information when you left at 5 to go get the search warrant, or the arrest warrant, is that correct?

A. Yes; after the briefing and everything we had that information.

Q. So what you are saying is that when you left Rice's house to go get a search warrant it was kind of an afterthought?

Mr. Herzog: Asking for a conclusion and opinion, your Honor.

The Court: Overruled. He may answer.

A. Well like I say, as I said before, we had checked at Peaks and were met by Sergeant Foxall and he—we did have a confrontation with the older Peak and we—Foxall finally checked and found that the house was empty and he wasn't there, and so we thought, in order to avoid this situation, we would get a search warrant.

Mr. Kammerlohr: I believe that is all.

Mr. Herzog: Let me develop the afterthought business, your Honor, if I may.

The Court: You may.

(Page 70) ROBERT M. PFEFFER

RECROSS-EXAMINATION

By Mr. Herzog

Q. Do you mean to tell me that you walked up to 2816 Parker Street, observed all this human activity, and as an afterthought went and got a search warrant?

A. There was no human activity.

Q. The TV was on?

A. The TV was on.

Q. Lights were on?

Q. And this doesn't connote to you human activity?

A. Well it could I guess, yes.

Q. Once again, referring to Exhibit D, nowhere in the body of that description of your activities after arriving at the Rice house, was there revealed any of this so-called afterthought or this attempt to reduce the search warrant to less than what it is? You went to get a search warrant, did you not? There wasn't any sojourn, was there?

A. No. We went to get a search warrant.

Q. And your testimony is the same, is it not, as Sergeant Swanson, within the period of time that you were at the Rice house you did not see or observe any activities regarding Duane Christopher Peak, is that right?

A. No.

(Page 71) Q. Did you at that time even know what Duane Christopher Peak looked like?

A. Yes.

Q. Do you know how old he was?

A. Yes. He was 15.

Q. Do you know how old Mr. Rice was at that time?

A. I am not sure. I thought he was 26, 27; I am not sure.

Q. All right. You had been working all this time, and you had been getting feedback from various cruiser officers, as well as the homicide and intelligence units?

A. Yes.

Q. And prior to the time you went to the Rice house, the Rice house was identified as such, the residence premises of David Rice?

A. Yes.

Q. And nowhere in the feedback that you had been getting from the intelligence units actively investigating the killing of Officer Minard—I am saying within a few hours or a few days of August 22, 1970—there was no indication to you that Duane Peak was at 2816 Parker, isn't that a fact?

A. Not to me.

Q. Did Lieutenant Swanson, then Sergeant Swanson indicate to you orally that he had been advised that Duane (Page 72) Christopher Peak on August 22, 1970 was at the premises of 2816 Parker Street?

A. Not that he was there at the time; no.

Q. Moreover at the briefing—at the briefing when your command captain gave you the general information, did he tell you that Duane Christopher Peak was seen at 2816 Parker Street on 8/22—August 22, 1970?

A. No.

Mr. Herzog: Thank you, your Honor.

The Court: Anything further, Mr. Kammerlohr?

Mr. Kammerlohr: Yes, your Honor.

ROBERT M. PFEFFER

REREDIRECT EXAMINATION

By Mr. Kammerlohr

Q. At that briefing did they tell you that he had previously been seen at 2816 Parker Street?

A. Yes.

Q. And that there might be a possibility that he might be there?

A. Yes.

Mr. Kammerlohr: That is all, your Honor.

Mr. Herzog: May I, your Honor?

The Court: You may.

(Page 73) ROBERT M. PFEFFER

RERECROSS-EXAMINATION

By Mr. Herzog

Q. You mean to tell me that your command captain told you that specifically, that Duane Peak might be at David Rice's house? That is one of the specific items of information you recall today that occurred almost four years ago?

A. Not that he was at this certain house at the time but there was a possibility that he could be there at this time—or at one of these other houses that we checked.

Q. Your effort really on August 22, 1970, was it not, Lieutenant, was to arrest members of the NCCF period?

A. My assignment at the time was to try to find Duane Peak.

Mr. Herzog: Thank you very much. Thank you, your Honor.

The Court: Anything further, Mr. Kammerlohr?

Mr. Kammerlohr: No, your Honor.

The Court: Lieutenant Pfeffer, a question or two please.

By the Court:

Q. Respecting the blasting caps that were found upstairs in the Rice house, where were they with reference to any wall or object within the particular room?

A. Your Honor, they were in the what would be considered (Page 74) the front room against the wall; and they were in a—there were several aluminum—or lino-

leum shaped cylinders; well they were linoleum rolled into a cylinder and they were right inside there. The rolls were approximately this size (indicating).

Q. You are indicating about a foot in diameter?

A. Well, I wouldn't say a foot. I would say about this size (indicating).

Q. Eight or ten inches?

A. Yes; you could see in there.

Q. And there were several of these rolls lying together there, were there?

A. Yes. They were standing upright.

Q. All right. And you put your flashlight beam into the roll and saw the blasting caps, is that it?

A. I was just looking around and just looked in there.

Q. What were you looking for at the time, do you remember?

A. Well, after the dynamite was found we did see wires in the house, and we thought maybe the house was wired.

Q. That is, at places other than where you found the blasting caps you found some wires?

A. Yes.

Q. And that then led to your looking around at other places, including inside the linoleum rolls for other objects which might be connected with the dynamite?

(Page 75) A. Yes.

Q. I noted, Lieutenant Pfeffer, on Plaintiff's Exhibit D-1, which I understand is the first page of your report, it states—and I will show it to you in a moment—but while I have it I will read it: "We also found explosive caps, and wires hidden behind the radio in the front room of the Rice residence". Now are those the explosive caps that you are referring to?

A. No. The explosive caps were inside the linoleum but there was some wires behind the radio.

Q. I see. The wires were behind the radio, the explosive caps were inside the linoleum?

A. Yes.

Q. All right. And I take it, from what you have said, that these linoleum rolls were not otherwise covered; that is, the rolls themselves were not covered with anything, nor were they in any kind of container, right?

A. No, they weren't.

Q. Now with respect to these long-nosed pliers, when was it that you saw those?

A. Well as we came in the house we came in cautiously; and we were just looking at everything; you know, anything that would look suspicious; and there was some tools laying on the counter in the kitchen.

Q. Were these pliers in any kind of container when you saw (Page 76) them?

A. No; not that I can recall.

Q. Did you see these pliers before you went into the basement?

A. Yes.

Q. Did you again see them after you came up from the basement?

A. I believe there were other officers up there. They were checking other things; and I don't recall seeing them after that.

Q. Were you able to see those pliers without the use of your flashlight?

A. Yes; there was lights on.

Q. Did you have to move anything in order to see the pliers?

A. No.

Q. They were not inside a drawer?

A. No.

The Court: Very well. Anything further, Mr. Herzog?

Mr. Herzog: No, your Honor.

The Court: Mr. Kammerlohr?

Mr. Kammerlohr: No, your Honor.

The Court: You may stand down, Lieutenant Pfeffer.

(Page 77) JAMES G. PERRY

being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Kammerlohr

Q. State your name please.

A. James G. Perry.

Q. What is your present position, Mr. Perry?

A. I am a member of the Omaha Police Division, Lieutenant in charge of the Homicide and Assault Unit.

Q. How long have you been with the Omaha Police Department?

A. Twenty-two years.

Q. What was your job with the department in August of 1970?

A. I was in the Crime Against Persons Section on C Shift.

Q. Do you remember what rank you held at that time?

A. I was a lieutenant.

Q. And on August 22nd, 1970 were you present at a briefing session with Captain Hartford and Sergeant Swanson, Sergeant Pfeffer and some other people?

A. Yes, sir, I was.

Q. At the Omaha Police Department?

A. Yes.

Q. Can you tell us what the purpose of that briefing session was?

A. There was probably 15 or 20 officers at this briefing. The purpose of it was to inform the officers that we were going to the NCCF headquarters in an attempt to (Page 78) arrest Duane Peak and Edward Poindexter, who I had warrants for.

Q. You are the officer who had the warrants at that time?

A. Yes, sir.

Q. The arrest warrants?

A. Yes, sir.

Q. And this was a rather big task force sort of thing then?

A. Yes, sir. There were a number of officers assigned, not only to Panther headquarters but to residences of a number of Duane Peak's relatives.

Q. Was the house of David Rice one of the places designated as a place to search for Duane Peak?

A. Yes, sir.

Q. You proceeded to the headquarters of the NCCF, didn't you?

A. Yes, sir.

Q. But you weren't present in the group that went over to what we have been referring to as the David Rice house?

A. No, I was not. After our return to—after the arrest of Cecil at Panther headquarters and the removal of a considerable amount of evidence, we proceeded to Cen-

tral Station. I checked with the other units and they had not located Duane Christopher Peak or Mr. Poindexter; and I instructed the unit that they had not apprehended him yet and to proceed with their previous assigned (Page 79) houses to check.

Q. As an experienced police officer at that time, considering what had been going on in Omaha, did you consider it urgent and pressing to arrest Duane Peak as soon as possible?

A. Yes, sir. He was a key witness, and it became obvious during the day prior to the raid that he was a key witness. His family hadn't seen him for something like two days, and they expressed concern that he may have been eliminated by members of the organization. And also we were considerably concerned with possible future bombings or boobytrap devices.

Q. You were concerned for the public?

A. For the public, for ourselves and just generally cool any social unrest we had at the time.

Q. Had you been working more hours than usual in the interim from the bombing of Officer Minard until the task force on August 22nd, 1970?

A. From the 17th of August when this occurred to the 22nd it just seemed like I continuously worked. I don't recall having much sleep during that period of time.

Q. And was this true generally of the officers in your division?

A. Yes, sir.

Q. What was that division again, at that time?

(Page 80) A. Homicide and Assault Unit. At that time I was assigned to Crime Against Persons Section; but I was transferred to the Homicide Unit to take over the investigation.

Q. Would this be true of both units then?

A. Yes, sir.

Mr. Kammerlohr: I believe that is all, your Honor.

The Court: Mr. Herzog.

JAMES G. PERRY

CROSS-EXAMINATION

By Mr. Herzog

Q. The places designated for search for Duane Peak, according to your testimony, were relatives of Mr. Peak, such as his parents' residence?

A. Parents, uncles, brothers, sisters, who he had a number of.

Q. And also places not aunts and uncles that he may be at?

A. Yes, sir. His aunts and uncles indicated when you mentioned the name of Rice or Poindexter, that you would also see Mr. Peak in company with them.

Q. Was this by your own investigation?

A. Yes, sir.

Q. Were Mr. Peak, Rice and Poindexter the only members of the organization?

A. No. There were a number of other members, and they (Page 81) all intertwined—when you would see one you would see the other one.

Q. On the basis of your own observation also?

A. Yes, sir.

Q. See one you see them all?

A. When you see one you might see two or three. I had seen photographs taken by one of the surveillance units with Mr. Peak in the front yard of the NCCF headquarters.

Mr. Herzog: That is all I have, your Honor. Thank you.

JAMES G. PERRY

REDIRECT EXAMINATION

By Mr. Kammerlohr

Q. When you say "Mr. Peak" you mean Duane Peak?

A. Yes, sir.

Mr. Kammerlohr: I have no further questions, your Honor.

The Court: Anything further, Mr. Herzog?

Mr. Herzog: No, thank you, your Honor.

By the Court:

Q. Mr. Perry, let me inquire: Were you the one that made the list of places that the officers ought to go to look for Mr. Peak?

A. Yes, sir.

(Page 82) Q. What was it that prompted you to put David Rice's house on the list?

A. Well as I recall his sister, Delia Peak, told us that day that Rice and Poindexter and her brother were constant companions; and then later on Donald Peak indicated that his brother told him that they were up there when they constructed the bomb.

Q. Up where?

A. At Rice's home, sir.

Q. Now you had been told by Donald Peak that Duane Peak had been at Rice's home when the bomb was constructed that killed Officer Minard. Is that what you are saying?

A. Yes.

Q. When did you receive that information?

A. As I recall it was in the late afternoon.

Q. Of what day?

A. Of the 22nd.

Q. Had you made that interview yourself?

A. I was present when Sergeant Pitman Foxall interviewed Donald Peak.

Q. Did you have any information from any source that Duane Peak had been in David Rice's house within the day or two before August 22nd, which as I understand it, was the date of the search of the Rice house?

A. Not at that time, sir; no, sir. Just—we knew from (Page 83) past experience where these people hung out and where we would probably find them. I, along with Sergeant Swanson at that time—I had just gotten out of the Intelligence Squad, and I was thoroughly familiar with the individuals involved and their habits.

Q. Well specifically what do you mean by that with respect to whether Duane Peak was or might be at the David Rice residence?

A. I did not have any specific information that he would be there or had been there within a couple days of that.

Q. What information did you have other than the statement from Donald Peak that Duane Peak had been at that residence at the time of the construction of the bomb? What other than that did you have that he had been at David Rice's house on other occasions?

A. Nothing from Donald Peak and nothing prior or after the bombing; but personal observation and just prior to that is the only thing I had.

Q. By "personal observation" what do you mean?

A. Probably 6 months previous to that I was assigned to the Intelligence Squad.

Q. You had personally seen, I mean Duane Peak at the Rice residence?

A. And in the company of Rice at the headquarters.

Q. All right. And did you have other sources of information (Page 84) to the effect that Duane Peak had been at Rice's house before the bombing?

A. These sources were from Duane's sisters and brothers who indicated he had been there.

Q. All right.

A. And that he frequented there.

Q. And that information related to times before the bombing, is that accurate?

A. Yes.

Q. Did you have information from any source that he had been at the Rice house any time after the bombing?

A. No, sir.

Q. Did you have information from any source to the effect that Duane Peak had been in the company of David Rice after the bombing but before the entry into the house?

A. No, sir.

Q. Now you did give testimony on cross-examination about some relatives saying that if you saw one you would see them all. Would you give us the details about that? What specifically was said and when and by whom, if you know?

A. Well as I recall Delia Peak indicated that her brother was hanging around, and to her knowledge she thought he was living at the NCCF headquarters. And she called Poindexter D. C., which apparently meant deputy chairman; (Page 85) and she clarified that, that D. C. was Mr. Poindexter; and that Mr. Rice—the three of them, along with House and Cecil, all hung around together.

Q. All right. When was that information conveyed to you?

A. The afternoon before the raid, sir.

Q. And the comments, and I take it from Delia Peak were to the effect that he, Duane Peak, may well be living at the NCCF headquarters and regularly was in the company of these other persons you mentioned?

A. Yes.

Q. And by that you meant it to mean at the time she made the statement she thought it was true?

A. Yes.

The Court: Now anything further, Mr. Herzog?

Mr. Herzog: No, your Honor.

The Court: Mr. Kammerlohr?

Mr. Kammerlohr: No, your Honor.

The Court: All right. You may stand down, sir.

RICHARD A. CURD

being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Kammerlohr

Q. State your name please.

(Page 86) A. Richard A. Curd.

Q. What is your position at this time, Mr. Curd?

A. At that time, sir, I was special investigator with what is known as Alcohol, Tobacco & Firearms division of the U. S. Treasury Department.

Q. That was in August, 1970?

A. Yes, sir.

Q. Are you still with the Treasury Department?

A. Yes, sir, I am.

Q. They have changed the name since then, haven't they?

A. Yes, sir. They changed it to the Bureau of Alcohol, Tobacco & Firearms. We are now referred to as special agents.

Q. You have heard the testimony of various officers here today concerning an investigation that was made at the headquarters of the NCCF and at the home of David Rice in Omaha, Douglas County, Nebraska on August 22, 1970?

A. Yes, sir. I have heard portions of the evidence.

Q. Were you present in those investigations?

A. Yes, sir, I was.

Q. Were you requested to join the Omaha Police Department or how did you happen to get involved in the investigation?

A. We had been involved in several investigations in the Omaha area involving explosive situations, bombings, and so forth; and the particular one I had (Page 87) been on that day was on the explosives that resulted in the death of Officer Minard. I had been assisting the Omaha Police Department with what little expertise we had, laboratory facilities available in Washington, D. C. for the examination of evidence, and so forth. So I suppose I could best describe it as they then contacted us on the 22nd regarding participation in the activities that occurred there in the afternoon and evening hours.

Q. And were there other officers of your division with you?

A. Yes, sir, there were.

Q. How many years had you been with the division prior to August, 1970?

A. It would have been in the vicinity of 18 months at that time, I believe.

Q. About 18 months?

A. Yes.

Q. Did you consider after the bombing of Officer Minard that the circumstances in Omaha may be in danger of further bombings and other dangerous conditions?

Mr. Herzog: Object to this. It is cumulative, repetitive, irrelevant and immaterial.

The Court: Overruled. He may answer.

A. Would you repeat the question?

The Court: Yes. The reporter will read it.

(Page 88) Reporter: "Did you consider after the bombing of Officer Minard that the circumstances in Omaha may be in danger of further bombings and other dangerous conditions?"

A. Yes, sir, I did.

Q. As an officer of the unit dealing with explosives, was it your opinion it was imminent that this matter be cleared up as soon as possible for the protection of the public and othe police officers?

A. Yes, sir. That would be my opinion.

Mr. Kammerlohr: May I approach the bench, your Honor?

The Court: You may.

Q. At the home of David Rice did you accompany Lieutenant Swanson, then Sergeant Swanson and others to the basement of that house—of the Rice home?

A. Yes, sir.

Q. Handing you what has been marked as Exhibit A can you describe what that area depicts?

A. It is a partial basement of heating ducts and hot water heater and a bunch of old boards and stuff.

Q. Did you see a box of dynamite in that basement that night on August 22nd, 1970?

A. Yes, sir, I did.

Q. Was it anywhere in that general vicinity shown in that (Page 89) picture when you first saw it?

A. Yes, sir, it was.

Q. And was the box covered in any way or partially covered, or did you have to move anything to see the dynamite, or what are the facts as to that?

A. I don't recall having had to move anything in order to observe it; no.

Q. Were you familiar with the shape of dynamite sticks at that time?

A. Yes, sir.

Q. And when you looked in the box did you recognize what appeared to be—what appeared to you to be dynamite sticks?

A. Yes, sir.

Q. Did you see anyone move anything before you were able to recognize them as such?

A. I don't recall anyone moving anything.

Q. Do you have an idea of about how large the—how wide this area is and how high it is, and how deep it is in which this box of dynamite was found?

A. Well it was more rectangular shaped.

Q. Was it tall enough for you to stand it?

A. I get the impression in thinking back on it the quarters were rather confined.

Q. You might have been able to hunch over in there a little (Page 90) bit, is that it?

A. Yes, sir.

Mr. Herzog: I am going to object, your Honor. It is leading and suggestive.

The Court: It is. Stricken.

Q. Can you give us an idea—how tall are you?

A. About 6 foot, sir.

Q. Going by your general height, about how high would you estimate this area to have been?

A. Five foot maybe; maybe 5 by 5 by 10; or something like that.

Q. The largest number being the depth?

A. Yes, sir.

Q. Handing you what has been marked as Exhibit B, does that appear to be the box of dynamite that you observed in Exhibit A?

A. Yes, sir.

Q. Or one very similar to it?

A. Yes, sir.

Q. When you were accompanying the officers to the NCCF headquarters and to the Frank Peak residence, and later to the David Rice residence, were you aware that they were looking for Duane Peak under an arrest warrant?

A. Yes, sir, I was.

Mr. Kammerlohr: I believe that is all, your Honor.

(Page 91) The Court: Mr. Herzog.

RICHARD A. CURD

CROSS-EXAMINATION

By Mr. Herzog

Q. You possess a law enforcement specialty with regard to handling firearms and explosives, is that correct?

A. I am not sure I understand your question, sir, by specialty.

Q. Do you have a specialty as a law enforcement officer?

A. Yes, sir.

Q. What is that specialty?

A. Alcohol, tobacco, firearms and explosives.

Q. One of your specialities is dynamite, is it not—explosives?

A. Under the explosives area, yes, sir.

Q. Is dynamite an explosive?

A. Yes, sir.

Q. You were brought to 2816 Parker Street at whose request?

A. I don't recall.

Q. Did you go to the NCCF headquarters on North 24th Street on August 22, 1970?

A. Yes, sir.

Q. At whose request?

A. Here again I don't recall any specific request having been made. We were there in my opinion on an assistance capacity and, you know, to help wherever there may be (Page 92) some help needed, and so forth. If we were under any direction or orders it would be under the Omaha Police Department.

Q. Did you participate in that briefing session at 4 o'clock in the afternoon on the 22nd?

A. Yes, sir, I did.

Q. Wasn't the concern and the emphasis at that time to seize and locate the dynamite?

A. I do remember it being mentioned. I think it was one of the concerns, yes.

Q. As a matter of fact didn't Lieutenant Swanson, then Sergeant Swanson, tell you that his concern was where was the dynamite or his concern about the location of the dynamite?

A. I don't recall anything by Sergeant Swanson at the time; no, sir.

Q. When you went into 2816 Parker Street did you know there was a cubbyhole, a lean-to type position of a door in the basement of the crawl space? Did you know of it beforehand?

A. No, sir.

Q. Did any of the officers mention to you that it was there?

A. Not that I recall.

Q. Did any of the officers ever say they had ever been to 2816 Parker Street prior to the time of your entry (Page 93) on August 22, 1970?

A. I don't recall them mentioning it; no, sir.

Q. When you were in the vicinity of 2816 Parker Street you actually made two trips to 2816 Parker Street, didn't you? Or were you part of the constabulary officers who were there waiting for Sergeant Swanson and Sergeant Pfeffer to return?

A. I was there only one time.

Q. Did you see Sergeant Pfeffer and Sergeant Swanson leave while you were present at 2816 Parker?

A. I cannot recall, sir.

Q. Do you recall whether or not anybody mentioned to you that Duane Peak was in that house at 2816 Parker Street during the afternoon of 8/22/70?

A. No, sir; I do not remember.

Q. Do you recall how the officers entered into 2816 Parker Street? Did some go in through the front door and some go in through the back door?

A. I recall the portion of where I was. That would be all I would be able to recall.

Q. Did you possess a firearm at that particular time?

A. Yes, sir.

Q. When you went into the premises was your firearm drawn?

A. As I recall it was; yes, sir.

Q. Were the other officers' firearms drawn?

(Page 94) A. It seems to me they were.

Q. Where did you go when you entered into the premises? Did you go directly to the basement?

A. Very shortly after entry I went to the basement, yes, sir.

Q. Now you were not attached to nor were you assigned to the Omaha Police Department, were you?

A. No, sir.

Q. You were more back-up or auxiliary help, were you not?

A. Yes, sir.

Q. And it was nt your duty at that time to arrest Duane Peak, was it?

A. Not specifically.

Q. You didn't feel as though it was your duty? You were there to help the police officers with your expertise in alcohol, tobacco and firearms, isn't that correct?

A. Yes, sir; that is basically true.

Q. How long had you been at the 2816 Parker residence before you entered? Can you compute for us the time of your arrival and the time of your entry?

A. Sir, I have no recollection regarding the time of arrival. I know it was dark, in the later part of the evening; but as I recall, almost immediately upon arriving after getting out of the cars, going up to the house there at 2816 Parker, and going to the rear of (Page 95) the house, and the entry was made almost—

Q. Simultaneously?

A. Yes, sir. I don't recall any delays or anything.

Mr. Herzog: I think that is all.

Mr. Kammerlohr: I have no further questions, your Honor.

The Court: All right. You may stand down.

Mr. Curd: Your Honor, I would like to correct one thing.

The Court: Yes, you may.

Mr. Curd: I think I said earlier I had been employed about 18 months at that time. That should be about a year.

The Court: About a year?

Mr. Curd: Yes.

The Court: All right. Now anything further, Mr. Herzog?

Mr. Herzog: No, your Honor.

The Court: Mr. Kammerlohr?

Mr. Kammerlohr: No, your Honor.

The Court: You may stand down, Mr. Curd.

Mr. Kammerlohr: Your Honor, I have some other officers present but I believe their testimony would be cumulative only and unless the Court (Page 96) desires that I call them, I think the State would be willing to rest.

The Court: Very well.

Mr. Herzog: Your Honor, the State's representative and respondent's counsel has called two witnesses that I subpoenaed pursuant to the Court's order. They would have been my witnesses had I proceeded, so I have no evidence to offer and so we would conclude our portion of the hearing.

(Page 97) CERTIFICATE OF REPORTER

I, Joseph L. Pasquale, Official U. S. Reporter District of Nebraska, certify that the proceedings of the within-titled case was reported by me in shorthand at the time and place heretofore stated;

that the foregoing transcript is a true and correct record of the proceedings had, transcribed by me.

/s/ Joseph L. Pasquale

Official U. S. Reporter

Lincoln, Nebraska